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No. 04-875

Supreme Court, U.S.
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In The
Supreme Court of the United States

LAFFIT PINCAY, JR. and
CHRISTOPHER J. McCARRON,

Petitioners,

v.

VINCENT S. ANDREWS, ROBERT ANDREWS, and
VINCENT ANDREWS MANAGEMENT CORP.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioners Laffit Pincay, Jr. and Christopher J. McCarron reply as follows to the respondents' brief in opposition ("Brief in Opp."):

I.

This Is a Timely and Jurisdictionally Significant Case

Respondents argue that this case is premature. (Brief in Opp. 11, 20-21.) Their argument is without merit. Petitioners are seeking certiorari review after the Ninth Circuit entered a judgment against petitioners in their appeal from the District Court's post-judgment order that extended the time for the respondents to file a notice of appeal. Appendix to Petition for a Writ of Certiorari ("Pet. App.") 4. This case, therefore, is an "after-judgment" case under 28 U.S.C. § 1254(1). *See, e.g., S.E.C. v. Suter,* 832 F.2d 988, 990 (7th Cir. 1987) (after district court enters final judgment, if post-judgment proceedings follow in the district court, those proceedings are, for purposes of appeal, a separate lawsuit, and the final orders that the district court enters are appealable). Thus, petitioners' appeal complied with usual appellate practice. *See Midwest Employers Cas. Co. v. Williams,* 161 F.3d 877, 879 (5th Cir. 1998); *Advanced Estimating System, Inc. v. Riney,* 130 F.3d 996, 997 (11th Cir. 1997); *Marx v. Loral Corp.*, 87 F.3d 1049, 1053 (9th Cir. 1996).

The Ninth Circuit's decision below conflicts with six other Circuits over the question of whether an experienced federal practitioner's negligent misunderstanding of a clear procedural rule cannot constitute "excusable neglect" under Rule 4(a)(5) of the Federal Rules of Appellate

Procedure ("Rule 4").[1] As *Browder v. Director, Department of Corrections Illinois,* 434 U.S. 257 (1978), explains "a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken. This 30-day time limit is 'mandatory and jurisdictional.'" *Id.* at 264 (citations omitted). Thus, even the respondents concede (Brief in Opp. 21, n. 7) that without "excusable neglect" the appeal filed by respondents is untimely and, therefore, the Ninth Circuit must dismiss the appeal for lack of jurisdiction. *See, e.g., Lowry,* 211 F.3d at 464; *Advanced Estimating System,* 130 F.3d at 999. In other words, the underlying issues of that appeal provide no basis for determining "excusable neglect" under Rule 4. *Lowry,* 211 F.3d at 464; *Advanced Estimating System,* 130 F.3d at 199; *cf. Ari v. American Bryce Ranches, Inc.* 316 F.3d 1066, 1071 (9th Cir. 2003) (district courts cannot consider underlying issues of parties' claims when presented with Fed. R. App. Proc. Rule 4(a)(6) motion).

II.

The Conflict Requires This Court's Immediate Resolution

The conflict that the Ninth Circuit has intentionally created (Pet. App. 13) arises from the Ninth Circuit's confusion about *Pioneer Investment v. Brunswick,* 507 U.S.

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[1] *Compare* Pet. App. 13 *with U.S. v. Torres,* 372 F.3d 1159, 1163 (10th Cir. 2004); *Silivanch v. Celebrity Cruises,* 333 F.3d 355, 369-70 (2d Cir. 2003), *cert. denied, sub nom. Essef v. Silivanch,* 124 S.Ct. 1047 (2004); *Lowry v. McDonnell Douglas Corp.,* 211 F.3d 457, 464 (8th Cir. 2000), *cert. denied,* 531 U.S. 929 (2000); *Midwest Employers Cas. Co.,* 161 F.3d at 879-80; *Advanced Estimating System,* 130 F.3d at 998; *Prizevoits v. Indiana Bell Telephone Co.,* 76 F.3d 132, 134 (7th Cir. 1996).

380 (1993). Pet. App. 7 ("Our circuit's confusion . . . begins with *Pioneer* itself."). Accordingly, more litigation in the lower courts will not lead to further clarity or shed further light on how this Court should analyze the conflict. Indeed, the Ninth Circuit's divided opinion is a catalogue of the conflict. Pet. App. 4-23.

Respondents argue "there is no direct conflict between the decision below and the decision of any other federal court of appeals." Brief in Opp. 15. Yet respondents' very experienced federal practitioner was, in essence, personally ignorant of or mistaken about a clear and customary procedural rule. *E.g.*, Plaintiffs-Appellants' Excerpts of Record ("ER") at 071-073. So were the federal practitioners in *U.S. v. Torres*, 372 F.3d at 1163; *Silivanch*, 333 F.3d at 369-70; *Lowry*, 211 F.3d at 464; *Midwest Employers Cas. Co.*, 161 F.3d at 879-80; *Advanced Estimating System*, 130 F.3d at 998; *Prizevoits*, 76 F.3d at 134. These Circuits held the excuse was insufficient to allow late filings under Rule 4. The same should be true in the Ninth Circuit.

Respondents fail to cite any Rule 4 case in which a federal court was as lenient toward an experienced federal practitioner as the District Court was in this case. Brief in Opp. 11-15. Thus, respondents implicitly concede that "[n]o circuit has taken a position as charitable to lawyer errors as the [Ninth Circuit does] today." Quoting Pet. App. 21, Kozinski, J. (dissenting).

Respondents argue that "it seems within the bounds of 'excusable neglect' that a lawyer placed too much reliance on someone who was trained to do the particular task and who had done it without mishap on every previous occasion." Brief in Opp. 19-20. The Second and Sixth Circuits have rejected arguments similar to respondents'.

In *Silivanch v. Celebrity Cruises*, the Second Circuit found no justification for treating the attorney differently from the attorney in *U.S. v. Hooper*, 43 F.3d 26, 28-29 (2d Cir. 1994) (per curiam). *Silivanch*, 333 F.3d at 369.

In *Hooper*, the attorney's legal assistant mistakenly thought that the rule called for a 30-day rather than a 10-day limitation, whereas in *Silivanch*, the attorney knew the 30-day limitation, but neglected to consult the calendar to decide when it expired. *Silivanch*, 333 F.3d at 367, 369.

Here, the respondents' experienced federal practitioner's excuse is that he relied on his calendar clerk. ER 071-073. Respondents give no justification, and none exists, for the Ninth Circuit and the District Court treating an experienced federal practitioner differently from the federal practitioner in *Hooper*. *See FHC Equities, L.L.C. v. MBL Life Assurance Corp.*, 188 F.3d 678, 686 (6th Cir. 1999) (citing and quoting with approval *Peake v. First Nat'l Bank & Trust*, 101 F.R.D. 544, 545-46 (W.D. Mich. 1984) (attorney's conscious reliance on associate's incorrect research is not "excusable neglect.")).

The District Court, to be sure, relied on the Ninth Circuit's decision in *Marx v. Loral Corp.*, 87 F.3d 1049 (9th Cir. 1996). Pet. App. 26-27. Yet as Judge Kozinski points out in his dissenting opinion (which Judges Rymer and McKeown joined), *Marx* was "a class action that bristled with client 'consultation difficulties.'" Pet. App. 17, Kozinski, J. (dissenting), citing *Marx*, 87 F.3d at 1053-54. In sharp contrast, petitioners' "action is not complicated; the [respondents'] lawyer worked at a large, sophisticated law firm [Boies, Schiller & Flexner LLP]; and the rule is as

clear as legal rules get . . . ." Pet. App. 18, Kozinski, J. (dissenting).

Significantly, the District Court's analysis ignored the *Pioneer* guideline, namely, that "ignorance of the rules or mistakes construing the rules do not usually constitute 'excusable' neglect." *Pioneer,* 507 U.S. at 392. Indeed, the District Court's decision does not refer to the guideline. Pet. App. 23-27. As this Court has recognized in other abuse-of-discretion settings, "a district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996).

Assuming arguendo that the District Court consciously decided that the *Pioneer* factors were "unusual" enough to allow the District Court to depart from the *Pioneer* guideline, the District Court abused its discretion under Rule 4. First, the number of days to file a notice of appeal in a civil case is not "unusual."

Second, rules are "usually" clear and "[t]here are surely complicated rules in the law, but [Rule 4] isn't one of them. [Even the judges composing the] majority [of the Ninth Circuit en banc panel below] agree: '[A]ny lawyer . . . should have been able to read the rule correctly.'" Pet. App. 18, Kozinski, J. (dissenting), quoting Pet. App. 3.

Third, even the respondents concede (Brief in Opp. 18) "[t]here is unlikely ever to be harm in the Rule 4(a)(5) setting, because the neglectful appellant has only 30 days after the expiration of his time for appealing in which to request relief." *Prizevoits,* 76 F.3d at 134. Thus, the Second, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits

hold that the usual lack-of-harm does not provide a permissible basis for a district court to depart from the *Pioneer* guideline in Rule 4 cases.[2] Their holding makes good sense and good policy because, otherwise, "the word 'excusable' would be read out of the rule if inexcusable neglect were transmuted into excusable neglect by a mere absence of harm." *Prizevoits,* 76 F.3d at 134. *Silivanch,* 333 F.3d at 366; *Lowry,* 211 F.3d at 463.

Finally, if "the delegation of repetitive legal tasks to paralegals has become a necessary fixture" (Pet. App. 5), then the respondents' experienced federal practitioner's usual delegation to his calendar clerk is not "unusual" (ER 071-073) and, therefore, does not provide a permissible basis for the District Court to depart from the *Pioneer* guideline, even if the calendar clerk had never before made a mistake. *Cf. Hooper,* 43 F.3d at 29; *see also FHC Equities*, 188 F.3d at 686 (citing and quoting with approval *Peake*, 101 F.R.D. at 545-46).

Common sense suggests that this Court considered delegation when it formulated the *Pioneer* guideline. Indeed, "[w]hile delegation may be a necessity in modern law practice, it can't be a lever for ratcheting down the standard for professional competence" (Pet. App. 19, Kozinski, J. (dissenting)) and for ratcheting down the standard of excusable neglect under Rule 4. The Advisory Committee on Appellate Rules plainly contemplated "that the standard of excusable neglect remain a strict one. . . . [I]t is not meant to cover the usual excuse that the lawyer

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[2] *Torres*, 372 F.3d at 1163; *Silivanch*, 333 F.3d at 369-70; *Lowry*, 211 F.3d at 464; *Midwest Employers Cas.*, 161 F.3d at 879-80; *Advanced Estimating System*, 130 F.3d at 998; *Prizevoits*, 76 F.3d at 134.

is too busy, which can be used, perhaps truthfully, in almost every case." Stern, *Changes in the Federal Appellate Rules*, 41 F.R.D. 297, 299 (1967).

Respondents are implicitly arguing that the District Court's extension is proper because it avoided penalizing the respondents for their experienced federal practitioner's omissions regarding a clear, well-known, readily accessible, mandatory, and jurisdictional rule. Brief in Opp. 1-21. This Court has made clear, however, that federal courts must hold clients accountable for the omissions of their federal practitioners. *Link v. Wabash*, 370 U.S. 626, 633 (1962); *accord Pioneer*, 507 U.S. at 396-97. Respondents' argument, therefore, does not provide an appropriate basis for the District Court to depart from the *Pioneer* guideline.

CONCLUSION

The Court should grant the Petition for a writ of certiorari.

Respectfully submitted,

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